Supreme Court, U.S.
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NO._____

IN THE

Supreme Court of the United States

JOSHUA MAGNUSSEN,

Petitioner,

v.

JAMES KENSEY DAHLQUIST
and COBB COUNTY, GEORGIA,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, despite this Court's guidance in *Hope v. Pelzer*, the Eleventh Circuit has continued to ignore this Court's determination in *United States v. Lanier*, and has continued to apply an overly rigid approach to the qualified immunity analysis.

2. Whether the requirement in *Tennessee v. Garner* that deadly force may not be used unless necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical harm, and that warning be given, where feasible, is incapable of providing "fair notice" to state actors of when deadly force may be used.

3. Whether decisional law gave law enforcement officers "fair notice" that shooting to kill, without warning, an unarmed suspect who was not an immediate threat and who was not endeavoring to escape, violated the suspect's Fourth Amendment rights thereby precluding qualified immunity.

4. Whether a decision on qualified immunity is premature when there are unresolved disputes of historical fact relevant to the immunity analysis.

LIST OF PARTIES

JOSHUA MAGNUSSEN
JAMES KENSEY DAHLQUIST
COBB COUNTY GEORGIA

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit was unpublished:

Joshua Magnussen, Plantiff/Appellant v. James Kensey Dahlquist, individually and in his official capacity as Cobb County Police Officer, and Cobb County, Georgia, Defendant/Appellee

No. 02-16611
Non-Argument Calendar
D.C Docket No. 99-01517-CV-JOF-1

The opinion was entered in the Eleventh Circuit Court of Appeals on July 16, 2003

JURISDICTION

The Judgment of the Court of Appeals sought to be reviewed was entered on July 16, 2003. This Court has discretionary jurisdiction over this cause by virtue of 28 U.S.C. § 1254(1).

PRIMARY CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The relevant constitutional provisions involved are:

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, support by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant statutes involved are:

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

(I) Course of Proceeding Below;

The Plaintiff/Appellant [hereinafter referred to as Magnussen] filed this action pursuant to 42 U.S.C. § 1983 for violations of his constitutional rights under the 4th, 5th and 14th Amendments to the United States Constitution. [R1-1].

Defendant/Appellee Dahlquist [hereinafter referred to as Dahlquist] is named as a defendant because of his unlawful use of deadly force and excessive force in arresting Magnussen. Cobb County was additionally named as a defendant for allowing deputies of the Cobb County Police Department to use excessive force in the arrest of citizens and for their failure to train, supervise, or discipline police officers with regards to proper constitutional and statutory limits in the exercise of their authority. [R1-1].

After extensive discovery, the case went to a jury trial before the Honorable J. Owen Forrester. At the close of the Plaintiff's case, the Defendant Dahlquist made a Rule 50 motion to dismiss. The first ground was that there was no legally sufficient evidentiary basis for a reasonable jury to find that the force used against the Plaintiff was unconstitutionally excessive. The second ground was that Dahlquist was entitled to qualified immunity on the grounds

the law was not clearly established at the time of this incident. [R10-245].

Based on the evidence presented in the Plaintiff's case in chief, the court first made the assumption that there was enough evidence of excessive force for the case to go to the jury if there was not qualified immunity. [R10-256]. In deciding the issue of qualified immunity, and in spite of the fact that the District Court recognized that Dahlquist had been impeached by a number inconsistent statements, the court granted Dahlquist's Rule 50 Motion to Dismiss, finding there was no clearly established law that said where there has been use of force capable of inflicting death and where there is now separation and no immediate apparent means of inflicting death or serious injury, the use of deadly force is not unreasonable where the officer did not know whether the danger was sufficiently attenuated. [R10-262, 265, 266, 267].1

The case was subsequently appealed to the Eleventh Circuit Court of Appeals. In the Court's unpublished opinion, the Court found that there was no "materially similar" case which would have given notice to Dahlquist that his conduct was unlawful, nor "that his conduct was so

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1 The Court in construing the evidence, stated: "the officer felt something to his side and later felt something to his leg that was unusual. He got up, saw blood on his trousers, and moved eight to twelve feet away in the opening or just past the opening just outside the garage. He did not see – he had seen a knife in the Plaintiff's hand, but at that point that he was separated from the Plaintiff he did not know where the knife was." [R10-264].

The court neglected to consider evidence, when viewed in a light most favorable to the Magnussen, that showed at the time Dahlquist shot Magnussen, Magnussen was unarmed, not threatening Dahlquist, was not attempting to evade arrest, that Dahlquist gave no warning prior to shooting, and that Magnussen was taken down on the first shot and that Dahlquist continued to fire three more shots after Magnussen was incapacitated.

egregiously violative of the Constitution that any reasonable officer must have known it at the time."

(2) Statement of Facts

On January 4, 1998, Magnussen was 16 years old. [R9-125,126]. Three days prior to that date, Officer Dahlquist had been briefed to be on the lookout for a 16-year-old white male driving a stolen eighties model white ford ranger pickup truck. [R9-52,53]. At about 3:00 p.m. on January 4, 1998, Dahlquist spotted a truck that met the description of the truck they were looking for being driven by a white - young male, and the young male was watching him closely as he went through and intersection. [R9-53,54]. Dahlquist began following Magnussen after Magnussen had stopped at a gas station and his behavior seemed suspicious in that Magnussen kept watching him and started to put gas in his truck, then changed his mind and did not. Dahlquist was able to see what the license plate number was and asked his radio operator to check the tag. This information was never confirmed. [R9-54,60]. Based on Magnussen's suspicious actions, Dahlquist followed him into a subdivision and turned on his blue lights for him to pull over. [R9-61]. Magnussen immediately stopped, exited the truck and began running. He had a tire iron in his hand. [R9-127,130]. Dahlquist chased him through some back yards.

Magnussens first face to face encounter with Dahlquist was after he had jumped a fence. Magnussen stopped and turned around and put his hands up. The tire iron was in his hand, but just dangling. Dahlquist drew his weapon, pointed it at Magnussen and said something to the effect that "I'm going to kill you, you mother fucker." [R9-131-133]. Magnussen was scared because Dahlquist was yelling at him and pointing a gun at him. [R9-166]. Magnussen began running again.

After a few moments, Magnussen and Dahlquist had a second encounter in another yard where again Magnussen stood looking at the officer, holding the tire iron. Dahlquist again drew his weapon and told Magnussen to get on the ground. Again Magnussen made the same comments, "shoot me," "go ahead and shoot me," "just shoot me." In neither of the encounters did Magnussen make any threatening gestures toward Dahlquist. [R9-78]. Magnussen never raised the tire iron toward him and never made a move like he was going to strike Dahlquist. [R9-79]. At no time during the two separate encounters did Magnussen ever make any threatening gestures toward Dahlquist. [R9-78].

Magnussen began running again. He went into a garage because he was scared Dahlquist was going to shoot him. Dahlquist was angry and was yelling. Magnussen threw the tire iron in the grass before he entered the garage. He was tired and figured if Dahlquist came around the garage and went by, that was fine with him, if he saw him in the garage it was Magnussen's intent to give himself up. [R9-134,135,168,171].

During the chase through the neighborhood, Dahlquist did not see anyone in any of the backyards. [R9-81]. When Dahlquist saw Magnussen in the garage, he was just standing there. Magnussen was not in any type of combative stance. Dahlquist did not see anything in his hands.[2] Dahlquist maintained a position outside the garage with his handgun pointed at Magnussen. [R9-83-85]. Dahlquist appeared tired and angry. [R9-22,23]. Magnussen put his hands up so that the officer could see them. [R9-171]. Dahlquist, without saying anything to him, motioned Magnussen over with his gun and with his eyes. Magnussen walked over toward him and Dahlquist reached out one of his hands, took Magnussen's left hand and put it behind his back. Magnussen had nothing in his hands.[3] [R9-138].

At that time, Magnussen thought Dahlquist was getting ready to handcuff him. However, Dahlquist suddenly began kicking Magnussen and he started cursing, "you stupid son of a bitch, you shouldn't have run from me." Dahlquist began hitting Magnussen over the back of the head. Magnussen blacked out and fell down in the middle of the garage. [R9-139-140]. Magnussen fell down and Dahlquist fell on top of him.

Magnussen crawled toward the back of the garage. He did not have a knife in his hands. Magnussen stood up, and turned around and put his hands up. Dalquist was at the front of the garage. Dahlquist was backing up and pulling out his gun. Dahlquist said, "that's it. Now you are dead,

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[2]On the other hand, Officer Fudenweider testified at trial that when he arrived on the scene he heard Dahlquist state that he (Dahlquist) had had to wrestle the tire iron away from Magnussen. [R9-120-121].

[3] Dahlquist at trial testified he saw no tire iron in Magnussen's hand. However, when questioned at trial regarding this statement, he admitted that in a previous sworn affidavit he had stated he saw Magnussen holding a tire iron in his hand. [R9-99].

you little son of a bitch." Dahlquist fired four shots at Magnussen as Magnussen stood with his hands up. [R9-138-142; 181;184]. Prior to Dahlquist shooting, Magnussen testified that the knife he had been carrying in his pocket was on the garage floor in the front of the garage by the car's tire, approximately 6-8 feet away. [4] [R9-146].

It is undisputed that Magnussen was not coming toward Dahlquist or making any move toward him when Dalquist began firing. R9-103,108,111,118]. There was no evidence that Magnussen was trying to escape when Dahlquist shot him. It is undisputed that Magnussen was standing at the rear of the garage with his hands raised.

Magnussen was shot four times. The first shot hit him in the lower abdomen, hitting a nerve, causing his leg to give out.[5] There was a pause and when the second shot occurred Magnussen was on one knee. The second and third shot hit Joshua in the chest and the fourth short hit him in the

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[4]At trial Dahlquist testified that he saw the knife in Magnussen's hand when he stood up and turned around to face him. [R9-108]. In Dahlquist's deposition he stated that he could see both hands and that there was nothing in his hands. [R-108; deposition, p.96]. At a juvenile court hearing Dahlquist testified that he cannot say that Magnussen actually saw the knife in his hand. At trial Dahlquist testified he never saw the knife come out of Magnussen's hand while he was shooting him. [R9-112].

[5]Dahlquist testified that Magnussen remained standing until the fourth shot. [R9-112]. Dr. Eric A. Awad testified Magnussen sustained femoral nerve damage as the result of the gunshot wound. The femoral nerve is a motor nerve that enervates five muscles in the leg. Dr. Awad testified that Magnussen's injury was enough to cause denervation, which means loss of nerve supply to the muscles that are enervated by the nerve itself in the left leg. [R10-243,244]. Plaintiff's evidence is that Magnussen could not have remained standing while being shot four times.

shoulder. [R9-142-144,186]. Dalhquist testified there was a pause between each shot - shots were **not** fired in rapid succession. [R9-111]. Dahlquist was approximately eight to twelve feet from Magnussen when he began firing, and Dahlquist was some 20 feet away when he fired the fourth shot. [R9-113].

After the incident Dahlquist reported receiving a small wound to the back of his leg, requiring two stitches. [R9-116]. The origin of this wound is disputed by the Plaintiff.

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit Court of Appeals continues to apply an improperly rigid analysis to qualified immunity contrary to this Court's holding in *Hope* and *Lanier*. This is an issue of extreme importance which should be settled by this Court.

In ruling on qualified immunity, *Hope* rejected the notion that materially similar facts are required in determining if law is "clearly established." All that is required for the law to be "clearly established" is that the officer have "fair warning" or "fair notice" that his actions would violate constitutional rights. *United States v. Lanier*, 520 U.S. 259, 137 L.Ed. 2d 432, 117 S.Ct. 1219. While a high degree of factual particularity may be required in some instances, fair and clear notice may be provided by a general constitutional rule identified in the decisional law, "even though the very action in question has [not] previously been held unlawful." *Hope*, 36 U.S. 730, 122 S.Ct. 2508, 2515-2516 (*citations omitted*).

Despite this Court's very clear directive in *Hope v. Pelzer*, the Eleventh Circuit continues to *require* cases with "materially similar facts" to avoid qualified immunity.

Moreover, despite this Court's very clear directive in *Saucier v. Katz*, 121 S.Ct. 2151 (2001) in which the Court clarified the analytical framework that should be employed when determining the doctrine of qualified immunity, the Eleventh Circuit has set forth a different standard.

The Eleventh Circuit Court of Appeals held, as the District Court had found, and Dahlquist had conceded in his brief, that first part of the qualified immunity analysis has been established, i.e. if the allegations of the Plaintiff were true, a constitutional violation had been established.

In determining whether the law was "clearly established", the Court looked to whether state officials were given "fair warning" under two circumstances: (1) where a materially similar case has already determined the conduct was illegal; or (2) whether the **conduct was so egregious** that any reasonable state official **must** have known it was unconstitutional.6

In addressing the issue of "materially similar" cases, the court merely cited the case of *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988), which was but one of the cases submitted by Magnussen. In a cursory fashion the Court dismissed *Samples* as not being materially similar. However, had the Court conducted a fair review of Eleventh Circuit Case law, it should have concluded that existing

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6 Magnussen's brief to the Eleventh Circuit and his argument in the District Court cited to *Tennessee v. Garne* , *Graham v. Conner*, and several 11th Circuit cases which gave "fair warning" to Dahlquist that his conduct in the case at bar was unconstitutional.

cases provided more than "fair warning" that the law was clearly established that the use of deadly force can only be reasonable if the facts show and "immediate" life threatening situation.7

After finding there were no "materially similar" cases to give Dahlquist notice that his conduct was unlawful, the Eleventh Circuit addressed the issue of whether Dahlquist's **conduct was so egregiously violative of the Constitution** that any reasonable officer **must** have known it at the time.

It should first be noted that there are no Supreme Court decisions that require the officer's conduct be "egregiously violative of the Constitution" or that a reasonable officer "must" have known at the time. The test under *Saucier*, is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

The Court utilizing the second part of its two part test, and ignoring disputed issues of material fact which occurred at the moment deadly force was used, concluded that the law was not clearly established because Dahlquist's conduct was not so egregious to be violative of the Constitution that any reasonable officer must have known it at the time. The Court then held Dahlquist was entitled to qualified immunity. The Court justified its opinion by stating that Magnussen must show that any reasonable police officer would have known that Magnussen was not a "grave threat" at the time he was shot. The Court stated, "this he cannot

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7 *McKinney v. Dekalb County*, 997 F.2d 1440 (1993); [deadly force may not be used unless the undisputed facts show an "immediate" life threatening situation; *Smith v. Maddox*, 127 F.3d 1416 (1997); *Pruitt v. The City of Montgomery, et al..*, 771 F.2d 1475 (1985); *Harrell v. Decatur County, Ga.*, 22 F.3d 1570 (1994); *Tennessee v. Garner*, supra, (1985); *Gilmer v. City of Atlanta*, 774 F.2d 1495, 1500-02 (1985), cert denied, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986).

do," based on disputed facts which Dahlquist alleged showed that at the time Dahlquist shot Magnussen, Magnussen had resisted arrest and had disobeyed several of the officer's commands. The Court proceded to wholly adopt Dahlquists version of the events of the shooting, rather than construing the facts more favorably to the non-moving party. The Circuit Court Opinion ignored the evidence which showed at the moment deadly force was used, Magnussen was no longer an immediate threat, was not endeavoring to escape, was unarmed, the shooting did not occur "mere moments" after Dahlquist received an injury to his leg, and that Dahlquist had been impeached on numerous occasions. The Circuit Court did not address any issue of whether warning was feasible or whether firing four shots was reasonable. The Circuit Court also misstated evidence because Dahlquist admits he had no knowledge that a knife had slashed his shirt. Nor did Dahlquist testify that he shot Magnussen "while he was staggering backward from the fight with blood flowing" from an unexpected stab wound in his leg.

Utilizing the Eleventh Circuit test of Plaintiff having to show the officers conduct was so "egregiously violative of the Constitution that any reasonable officer must have known at the time" is at best absurd under the present guidelines of this Court. Under this line of reasoning, officers would be reasonable in believing that they are justified in shooting to kill, without warning, any person who has assaulted them regardless of the fact that at the time deadly force was used the suspect was no longer an immediate threat and was not endeavoring to escape. It should be obvious that this is not constitutionally correct in light of general constitution rules and specific guidelines for use of deadly force enumerated in *Tennessee v. Garner* .

Precedent precisely on point is unnecessary. Perfect accuracy is not required. Common sense is relevant to the

inquiry about whether the contours of the right at issue were clearly established. Fair warning is all that is required.*Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed. 2d 666 (2002). The Eleventh Circuit's test for "clearly established law" not only is contrary to previous holding of this Court, but the holding in this case effectively takes common sense out of the analysis.

The Circuit Court's "justification" for qualified immunity in this case is fiction because record is completely devoid of any facts from the trial court that at the time Dahlquist shot Magnussen he had any knowledge Magnussen had slashed his shirt with a knife; that Dahlquist was armed; nor that mere moments after being stabbed he staggered backward with "blood flowing" from an unexpected stab wound in his leg. It appears that the Circuit Court spontaneously included these "facts" and, further, construed them to Officer Dahlquist's advantage, rather than construing the record facts more favorably to the Plaintiff, as required by law.

It should also be noted, as pointed out in the Appellant's Brief to the Eleventh Circuit, the District Court neglected to consider evidence presented at trial that showed at the time Dahlquist shot Magnussen, Magnussen was unarmed, further, undisputed evidence showed that Magnussen was standing upright and not making any move towards Dahlquist, was not threatening Dahlquist, and in fact was standing upright with his hands raised surrendering.

The evidence at trial showed at the time the first shot was fired, Dahlquist was some eight to twelve feet away from Magnussen and Magnussen was taken down to his knee on the first shot. Subsequent shots were not fired in rapid sucession and Dahlquist was some 20 feet away when he fired the fourth shot.

Despite the admonition by this Court for the Eleventh Circuit to remove its "rigid glass" on the qualified immunity analysis and to apply common sense "fair notice" approach to determining what law is "clearly established" the Eleventh Circuit has refused to do so. The Court continues to hold that prior decisional law, including *Tennessee v. Garner*, does not provide sufficient notice that shooting without warning, an unarmed suspect who poses no immediate threat and is not endeavoring to escape, is unconstitutional. This is an issue of tremendous impact and should be resolved by this Court.8

B The Eleventh Circuit has decided an issue of federal law of great importance which appears to be one of first impression that should be settled by this Court: whether the requirement in *Tennessee v. Garner* that deadly force may not be used unless necessary to prevent escape and officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others, and that warning be given, where feasible, is incapable of providing "fair notice" to state actors of when deadly force may be used.

In dealing with fleeing suspects, the criteria for judging the reasonableness of use of deadly force by law enforcement has been that "deadly force "may not be used unless necessary to prevent escape and officer had probable cause to believe that the suspect poses a significant threat of

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8 See also *Vaughan v. Cox, et al.*, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d (2002); *Thomas v. Roberts*, 2003 U.S. App LEXIS 4143 (11th Cir March 10, 2003); *Willingham v. Loughman*, 2003 U.S. App. 2928 (11th Cir. Feb. 18, 2003); all remanded by this Court for further consideration under *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

death or serious physical injury to the officer and others, and if, where feasible, some warning has been given." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701 (1985).

Subsequent to *Tennessee v. Garner*, this Court in *Graham v. Connor*, 490 U.S. 386, 394-95 (1989), clearly established the general proposition that the Fourth Amendment's freedom from unreasonable searches and seizures encompasses the right to be free from the use of excessive for in the course of an arrest. In *Graham* the Court held that claims of excessive force in the context of arrest and investigatory stops should be analyzed under the Fourth Amendment's "objectively reasonableness standard". Graham sets forth the list of factors relevant to the merits of the constitutional excessive force claim, "requiring careful attention to the facts and circumstances of each particular case, including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. At 396. Citing, *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.E.2d 1 (1985). [Emphasis added].

In determining whether the law was "clearly established," the Court acknowledged *Hope v. Pelzer*, as mandating that the Court look to whether state officials were given "fair warning" that their conduct was unconstitutional.

In rendering its decision as to whether the law was clearly established to provide "fair warning," the Eleventh Circuit totally disregarded *Tennessee v. Garner* and other Eleventh Circuit cases in their analysis as to whether the clearly established law provided "fair warning." Instead the Circuit selectively looked to Georgia State law and found there were no "materially similar" cases which would have given notice to Dahlquist that his conduct was unlawful.

It should also be noted that the Eleventh Circuit, contrary to the other Circuits, refuses to look outside its own Circuit for "clearly established law" purposes, and refuses to look to the "consensus of persuasive authority." *See, Wilson v. Layne*, 526 U.S. 603, 617 (1999). This approach with the Eleventh Circuit's overall slant toward summarily disposing of as many of its section 1983 cases as possible is offensive to civil rights law.

The Eleventh Circuit's decision in the case at bar is also inconsistent with other cases more recently decided in this circuit, causing an unfair result for Mr. Magnussen. See, *Vaughan v. Cox*, No. 00-14380 (11th Cir. 08/29/2003), wherein the court, sua ponte vacated two prior decisions reported at 316 F.3d 1210 (11th Cir. 01/03/2003) and 264 F.3d 1027 (11th Cir. 2001). In the opinion reported at 316 F.3d 1210, the court held that *Tennessee v. Garner* does not apply with "obvious clarity," then reversed itself in the opinion reported in case No. 00-14380 and applied *Tennessee v. Garner* to determine whether the law gave "fair warning" under *Hope v. Pelzer*.9

The very purpose of *Tennessee v. Garner* was to set out specific guidelines for use of deadly force on fleeing suspects. Those guidelines are clearly reflected in local, state and nationally recognized standards of police procedure. To say that those specific guidelines are too vague to provide any fair notice in this situation is absurd.

See for example, *Carr v. Castle*, No. 02-6079 (10th Cir. 08/04/03) in which the Tenth Circuit, reviewing and

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9 *Vaughan v. Cox*, 361 F.3d 1210, was decided on 01/03/2003. *Magnussen v. Dahlquist* was decided on 07/16/2003. *Vaughan v. Cox*, No. 00-14380 was decided on 08/29/2003.

affirming a district court's denial of a Rule 56 motion based on qualified immunity, wrote:

> "From that pro-Carr perspective as is required by Rule 56, the issue to be resolved becomes the familiar question of when an officer can use deadly force to apprehend an unarmed fleeing suspect – an issue thoroughly vetted nearly two decades ago in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). We set out the portions of that pronouncement that (although it speaks in terms of "escape" rather that subduing someone) plainly control this case:
>
> Where the suspect poses no immediate threat to the Officer and no threat to others the harm resulting from failing to apprehend him does not justify the use of deadly force to do so...A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.
> ....As the district court put it: "There is no question that at the time of the incident the law concerning when the use of deadly force is appropriate was clearly established. There was clear and ample Supreme Court and Tenth Circuit case law which predates the incident by several years."
>
> "In those terms and in terms of the facts viewed from the required pro-Carr stance, the qualified immunity issue here would plainly come under the rubic marked out in *Hope v. Pelzer*, 536 U.S. 730 (2002).

Carr v. Castle, Supra. It should be explained that the facts in Carr show that during the attempted arrest of Carr, he struck one officer in the head and kicked the other officer in the groin the fled. Carr was then involved in a subsequent encounter where Carr was holding a four inch piece of concrete in his hand and threw same at officers. It was

disputed whether Carr was shot eleven times while he throwing the piece of concrete at the officers or whether he was shot eleven times after he had finished throwing the piece of concrete.

Given the sharp difference between the Eleventh Circuit's Opinion in this case and the Tenth Circuit's treatment of Carr, guidance by this Court is necessary to provide uniformity across the courts of the United States in dealing with the issues of what law "is clearly established" and whether in the Eleventh Circuit the law in *Garner* is sufficiently clear to qualify as "established law" for qualified immunity and summary judgment purposes.

C. The Writ should be granted in this case because it involves an issue of great importance concerning whether a decision on qualified immunity is premature when there are unresolved disputes of historical fact relevant to the immunity analysis. The Eleventh Circuit decision below is inconsistent with other federal appellate decisions in the area of qualified immunity.

"A qualified immunity ruling...is...a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case". *Johnson v. Jones*, 515 U.S. at 313, 115 S.Ct. at 2156 (1995), citing *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Surely it is not for the court to preempt the jury and resolve all material facts in dispute. See, *Saucier v. Katz*, 121 S.Ct. 2151, 2156; *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). Where facts are in dispute, summary judgment on the ground of qualified immunity is not appropriate, *McKinney v. Dekalb*, 972 F.2d 1230, 1234-35 (11th Cir. 1992).

As noted by the 3rd Circuit in *Curley v. Klem*, 298 F.3d 271 (3rd Cir. 08/02/02):

> "Just as the granting of summary judgment is inappropriate when a genuine issue exists as to any material fact, a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis. Thus, while we have recognized that it is for the court to decide whether an officer's conduct violated a clearly established constitutional right, we have also acknowledged that the existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue. See *Sharrar v. Felsing*, 128 F.3d 810, 828 (3rd Cir. 1997); see also *Karnes v. Skrutski*, 62 F.3d 485, 499 (3rd Cir. 1995)
>
> Our sister circuits agree upon this general prohibition against deciding qualified immunity question in the face of disputed historical facts. See, e.g. *Wilson v City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002); *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002); *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir.2002); *Knussen v. Maryland*, 272 F.3d 625, 634 (4th Cir. 2001); *Kimberlin v. Quinlan*, 199 F.3d 496, 502 (D.C.Cir. 1999); *Tierney v. Davidson*, 133 F.3d 189, 194 (2d Cir. 1998); *Swain v. Spinney*, 117 F.3d 1, 10 (1st Cir. 1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1487-1488 (11th Cir. 1996); *Williams v. Pollard*, 44 F.3d 433, 435 (6th Cir. 1995); *Apostol v. Landau*, 957 F.2d 339, 342 (7th Cir. 1992); *Saloman v. Schwarz*, 948 F.2d 1131, 1139 (10th Cir. 1991). Further, the prohibition does not appear at all

> inconsistent with the analytical framework recently detailed by the Supreme Court in *Saucier*."

The Eighth Circuit, in *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 199), held that if there is a fact question as to whether or not a warning was feasible before the use of deadly force, or if there is a question of fact whether or not the suspect posed a threat of serious physical or death to the officer or others at the time of the shooting, that summary judgment on qualified immunity grounds would be improper.

Other circuits clearly hold that whether the force used was excessive must be objectively determined and is a jury question. *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991) *cert denied*, 120 L.Ed.2d 872, 112 S.Ct. 2995 (1992); *Posr v. Doherty*, 944 F.2d 91 (2nd Cir. 1991); *Dixon v. Richer*, 992 F.2d 1456 (10th Cir. 1991). Further this Court has held that "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts and jury functions, not those of a judge." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

Here, the Eleventh Circuit has stripped the Plaintiff of his right to have the jury perform these functions. The Eleventh Circuit issued its decision on qualified immunity where there were still unresolved factual disputes. This practice is inconsistent with other federal circuit decisions which have held this to be inappropriate. A decision from this Court is of extreme importance to clarify the law of the Eleventh Circuit in this area.

CONCLUSION

The Writ in this case should be granted because is there is need for the Court to further clarify the law of qualified

immunity. This Court has previously provided guidance to the Eleventh Circuit Court of Appeals. The Eleventh Circuit has largely ignored this guidance.

The Eleventh Circuit refused to acknowledge the holding in *Hope* that "fair notice" to a defendant may be provided by general constitutional rules in obvious situations. The Eleventh Circuit continues to require "something clearer than 'clearly established' and 'something beyond 'fair notice'"*Hope*, 536 U.S. 730, 122 S.Ct. 2508, 2515, *quoting Lanier*, 520 U.S. 259 at 270-271.

The Eleventh Circuit has incorrectly refused to apply the mandates from this Court in *Tennessee v. Garner*, and has instead authorized an officer to use deadly force if the officer merely believes that the suspect appears "gravely dangerous."

The Eleventh Circuit decision below is inconsistent with other Supreme Court and federal appellate court decisions, and is inconsistent with other decisions within that circuit.

The Eleventh Circuit decision below is inconsistent with other Federal appellate court decisions which hold that it is premature to render a decision on qualified immunity where unresolved disputes of historical fact exist relevant to the immunity analysis.

For these reasons, the Petition for Writ of Certiorari in this case should be granted, or in the alternative the case should be remanded to the Eleventh Circuit for reconsideration in light of *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Vaughan v. Cox,* No. 00-14380 (11th Cir. 08/29/03).

Respectfully Submitted,

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Atlanta, Georgia 30305
404/237-3242
Attorney for Petitioner

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16611
Non-Argument Calendar

D.C. Docket No. 99-01517-CV-JOF-1

JOSHUA MAGNUSSEN,

Plaintiff-Appellant,

Versus

JAMES KENSEY DAHLQUIST, individually and in his official capacity as a Cobb County, Georgia Police Officer,
COBB COUNTY, GEORGIA,

Defendants-Appellees,

Appeal from the United States District Court
for the Northern District of Georgia

(July 16, 2003)

Before TJOFLAT, BURCH and MARCUS, Circuit Judges.

PER CURIAM:

Appellant Joshua Magnussen appeals from the district court's order dismissing his 42 U.S.C. §1983 claim against Appellee James Kensey Dahlquist. Magnussen argues that the district court reversibly erred by finding that Dahlquist was entitled to qualified immunity.

"A district court's decision to grant or deny the defense of qualified immunity is a question of law which we review de novo, accepting the factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." Gonzalez v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003).[1]

Upon thorough review of the record as well as careful consideration of the parties briefs, we find no reversible error and affirm.

The facts of this case are heavily disputed, but after drawing all reasonable inferences in favor of the plaintiff, we base our decision on the following set of facts. On January 1, 1998, Cobb County, Georgia Police Officer James Dahlquist was alerted to be on the look out for a 16 year-old white male driving a stolen eighties model white Ford Ranger pickup truck. On January 4, 1998, Dahlquist spotted a white Ford truck meeting that description and after the suspect exhibited suspicious behavior, Dahlquist turned on his blue lights to pull him over. The suspect, Magnussen, then exited the truck and began running away from the officer with a tire iron in his hand.

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[1] Although qualified immunity generally "must be determined as early as possible in the lawsuit," Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1184 (11th Cir. 1994), "a defendant who does not win summary judgment on qualified immunity grounds may yet prevail on those grounds at or after trial on a motion for a judgment as a matter of law." Kelly v. Curtis, 21 F.3d 1544, 1546 (11th Cir. 1994); see also Swin v. City of Wadley, Alabama, 51 F.3d 988, 992 (11th Cir. 1995).

Dahlquist chased him through the front and back yards of several neighborhood homes, and after jumping a fence into someone's yard, encountered Magnussen with the tire iron dangling from his hand. Dahlquist aimed his gun at Magnussen and told him to get on the ground. Instead, Magnussen yelled "shoot me, shoot me," before turning around and running still again. Shortly thereafter, he and Magnussen came face to face in another yard, with Magnussen once again refusing to drop the tire iron or to get down on the ground and instead yelling "shoot me". Magnussen again ran off with the tire iron, temporarily escaping from Officer Dahlquist after Dahlquist fell down trying to clear a fence. Finally, Magnussen, threw the tire iron into a patch of grass and attempted to hide inside a two-car garage.

Dahlquist, cornered Magnussen in the garage and motion for Magnussen to walk over. As he took Magnussen's hands to cuff him, Magnussen began to struggle and Officer Dahlquist attempted to take Magnussen to the ground. At this point, a violent struggle broke out between the two men, the details of which are difficult to discern, in part because Magnussen claims to have been unconscious during the fight and in part because Dahlquist's version of the fight has changed several times. What is undisputable, however, is that during the course of the fight, Magnussen stabbed Officer Dahlquist in the leg with a six inch switchblade. In addition to the stab wound to his leg, Magnussen also cut Officer Dahlquist through his shirt, although the protective vest Dahlquist wore under the shirt saved his chest from injury.

When Dahlquist realized that he had been stabbed and blood drawn, he pushed away from Magnussen, backed up, and according to Magnussen said, "that's it. Now you are dead, you little son of a bitch." As he continued to

retreat, he shot Magnussen four times, the first shot taking place from eight away and the last one from approximately twenty. Magnussen claims that he was no longer holding the knife with Dahlquist shot him and instead had both hands up in a position of surrender. After being shot the first time, Magnussen dropped to one knee. He finally fell backwards after the forth shot. The entire encounter, from the time Dahlquist turned on his light until the point at which he shot Magnussen, lasted less that three minutes.

At the close of discover, Dahlquist moved for summary judgment, arguing that he was entitled to qualified immunity. The district court declined to entertain the motion on procedural ground and trial commenced on November 12, 2002. At the close of Magnussen's case, Officer Dahlquist moved for judgment as a matter of law, again arguing that he was entitled to qualified immunity. The district court determined that although the use of excessive force in executing an arrest is a constitutional violation, Officer Dahlquist did not have "fair notice" that his conduct with respect to Magnussen violated the Constitution. Specifically, the district court held that none of our prior caselaw was factually similar enough to give Dahlquist fair warning, nor did "general statements of the law" so obviously apply to Dahlquist's situation that a violation should have been evident to him. Magnussen now appeals from the district court's ruling.

We use a two part test to determine whether state officials are entitled to qualified immunity. First, we determine whether the plaintiff's allegations, if true, establish a constitutional violation. See Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

In this case, the district court found, and Dahlquist concedes in his brief, that the first part of qualified immunity

analysis has been established. Therefore, the only question we are asked to decide on appeal is the second: whether it was "clearly established" at the time Officer Dahlquist shot Magnussen that this actions violated Magnussen's constitutional rights. We conclude that it was not.

In determining whether the law was "clearly established," we look to whether state officials were given "fair warning" that their conduct was unconstitutional. See Lee v. Ferraro, 284 F.3d 1188, 1198-99 (11th Cir. 2002); Rowe v. City of Ft. Lauderdale, 279 F.3d 1271, 1280 n.10 (11th Cir. 2002).

The Supreme Court has stated that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985). On the other hand, if Magnussen "would have appeared to a reasonable police officer to have been gravely dangerous" the officer cannot be held liable for the use of excessive force. Pace v. Capobianco, 283 F.3d 1275, 1281 (11th Cir. 2002).

Magnussen cites Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988)(denying qualified immunity to a police officer who fatally shot a knife wielding 16 year-old boy) as precedent giving fair notice to Dahlquist that he could not use deadly force on Magnussen. However in Samples, the boy weighed ninety-seven pounds less that the officer, had not attacked the officer previously, was only carrying a pocket knife, may not have even opened the pocket knife, and may actually have been shot in the back by the officer. Id. At 1322. Obviously the, Samples is a much different case. A comprehensive analysis of the other cases city by Magnussen reveals that they are equally dissimilar. We thus

find no "materially similar" case which would have given notice to Dahlquist that his conduct was unlawful.

Therefore, Magnussen must show that Dahlquist's conduct was so egregiously violative of the Constitution that any reasonable officer must have known it at the time. See Rodriquez v. Farrell, 280 F.3d 1341, 1350 n.18 (11th Cir. 2002) cert. denied, ___U.S. ___, 123 S.Ct. 1482, 155 L.Ed 2d 225 (2003). Put differently, Magnussen must show that any reasonable police officer would have known that Magnussen was not a "grave threat" at the time he was shot. See, Pace, 283 F.3d at 1281. This he cannot do. At the time Dahlquist shot him, Magnussen had already resisted arrest three times within the span of three minut4es and had disobeyed several of the officer's commands. During the most recent encounter, Magnussen had seemingly submitted to arrest only to subsequently stab Dahlquist in the leg with a six inch switch blade, and slash his shirt with the knife. Dahlquist shot Magnussen mere moments after being stabbed and although Magnussen claims that he no longer had control of the knife, he does not assert that Dahlquist knew that, or that Dahlquist knew that Magnussen did not have other surprise weapons on his person. Simply put, when Dahlquist shot Magnussen while staggering backward from the fight with blood flowing from an unexpected stab wound in his leg, it was not unreasonable to think that he was in grave danger. He was therefore entitled to qualified immunity.

AFFIRMED.

App. 7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOSHUA MAGNUSSEN,

Plaintiff,

v.

JAMES KENSEY DAHLQUIST, ET AL,

Defendants.

DOCKET NO.
1:99-CV-1517-JOF

ATLANTA, GA.
NOV. 14, 2002

VOLUME 3
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
BRUCE R. MILLAR
SONJA L. SALO
ATTORNEYS AT LAW

FOR THE DEFENDANTS:
CARLTON LATAIN KELL
HUGH WILLIAM ROWLING, JR.
ATTORNEYS AT LAW

LOIS D. PHILLIPS, RMR, CPR
OFFICIAL COURT REPORTER

App. 8

UNITED STATES DISTRICT
COURT
ATLANTA, GEORGIA 30303-3361
404/215-1317

THE COURT: IN DECIDING THE MOTION TO DISMISS ON THE BASIS OF QUALIFIED IMMUNITY, MUST CONSTRUE THE FACTS IN A WAY THAT IS MOST FAVORABLE TO THE PLAINTIFF, AND INDEED ONLY THE PLAINTIFF HAS PUT ON EVIDENCE.

THE FACTS SHOW THAT THE OFFICER DAHLQUIST SUSPECTED PLAINTIFF MAGNUSSEN OF BEING A JUVENILE DRIVING A STOLEN TRUCK, HE FOLLOWED HIM INTO A RESIDENTIAL NEIGHBORHOOD. THE PLAINTIFF STOPPED HIS TRUCK, GOT OUT, AND RAN TO SEVERAL POINTS IN THE NEIGHBORHOOD. HE – WHEN HE EXITED THE TRUCK, HE HAD A TIRE IRON IN HIS HAND. AT LEAST ONE POINT THE PLAINTIFF STOPPED, STILL HOLDING THE TIRE IRON, RAISED HIS HANDS, AND THE OFFICER DREW HIS WEAPON, HE SAID, "SHOOT ME, JUST SHOOT ME", AND THE OFFICER DREW HIS WEAPON, HE SAID, "SHOOT ME, JUST SHOOT ME", AND THEN THE PLAINTIFF TURNED AND RAN.

THE ENTIRE CHASE TOOK ABOUT THREE MINUTES UP THROUGH THE USE OF THE FORCE THAT IS IN QUESTION. AT SOME POINT THE OFFICER LOCATED THE PLAINTIFF IN AN OPEN TWO-CAR GARAGE UNDERNEATH A RESIDENCE. THE OFFICER WAS UNAWARE THAT THE PLAINTIFF HAD DISPOSED OF THE TIRE IRON, BUT DID NOT SEE IT. THE OFFICER STOOD

IN THE ENTRANCE TO THE LEFT SIDE OF THE GARAGE, THE RIGHT SIDE OF THE GARAGE WAS FILLED WITH AN AUTOMOBILE. THE PLAINTIFF BEGAN TO MOVE TOWARD ONE CORNER OF THE DOOR, THE OFFICER MOVED TO HIS LEFT, THE PLAINITFF STOPPED OR RETREATED BACK INTO THE GARAGE.

AT SOME POINT BECAUSE OF THE MOVEMENT OF THE PLAINTIFF THE DEFENDANT DAHLQUIST BELIEVED THAT HE HAD AN OPPORTUNITY TO EFFECT AN ARREST AND MOVED IN. THE PLAINTIFF'S TESTIMONY IS THAT HE DIDN'T RESIST GIVING THE OFFICER HIS LEFT HAND. THE OFFICER EFFECTED SOME SORT OF A TRIP, AND THE PLAINTIFF AND THE OFFICER ENDED UP ON THE FLOOR OF THE GARAGE, PLAINTIFF ON HIS HANDS AND KNEES, THE OFFICER ESSENTIALLY ON HIS HANDS AND KNEES JUST OVER THE BODY, BUT OVER THE LEFT SIDE OF THE BODY OF THE PLAINTFF. APPARENTLY THERE WAS SOME STRUGGLE, AND THE OFFICER FELT SOMETHING TO HIS SIDE AND LATER FELT SOMETHING TO HIS LEG THAT WAS UNUSUAL. HE GOT UP, SAW BLOOD ON THE BACK OF HIS TROUSERS, AND MOVED EIGHT TO TWELVE FEET AWAY IN THE OPENING OR JUST PAST THE OPENING JUST OUTSIDE THE OPENING OF THE GARAGE. HE DID NOT SEE – HE HAD SEEN A KNIFE IN THE PLAINTIFF'S HAND, BUT AT THE POINT THAT HE WAS SEPARATED FROM THE PLAINTIFF HE DID NOT SEE A KNIFE, HE DID NOT KNOW WHERE IT WAS.

HE THEN FIRED FOUR SHOTS AT THE PLAINTIFF, ONE OF THOSE SHOTS COULD HAVE HAD THE EFFECT OF CAUSING HIS LEG TO GIVE WAY, AND THE PLAINTIFF CONTENDS THAT HE BEGAN FALLING AFTER THE FIRST SHOT, BUT THE COURT DOESN'T UNDERSTAND THAT HE HAD FALLEN COMPLETELY TO THE GROUND. IN ANY EVENT THE SHOTS WERE FIRED IN RAPID

SUCCESSION. BASED ON THE TESTIMONY IN THE COURT, THE COURT WOULD SAY THAT THE SHOTS WERE FIRED BETWEEN A SECOND AND A SECOND-AND-A-HALF APART. SUBSEQUENTLY, THE PLAINTIFF PLED GUILTY IN JUVENILE COURT FOR ASSAULTING OFFICER DAHLQUIST.

I HAVE CONSIDERED THE CASES THAT I HAVE FOUND, I HAVE CONSIDERED THE CASES THAT THE PLAINTIFF AND DEFENDANT HAVE GIVEN ME ON THE ISSUE OF FAIR WARNING AS SET OUT IN HOPE VERSUS PELZER, 155 LAWYERS EDITION 2ND 666. ONE CIRCUIT UNDER THE LASSITER DOCTRINE HAS REQUIRED IN THE PAST MATERIALLY SIMILARITY OR VIRTUAL CONGRUENCY OF FACTS BETWEEN ONE CASE AND ANOTHER TO GIVE AN OFFICER WARNING THAT HIS CONDUCT IS UNLAWFUL. THAT STANDARD IS RELAXED BY HOPE VERSUS PELZER, BUT IT IS NOT ELIMINATED. A READING OF THE FACTS SHOWS THAT THE SUPREME COURT FOUND FIFTH CIRCUIT PRECEDENT THAT AN INSTRUCTIVE UNDER SIMILAR BUT NOT IDENTICAL CIRCUMSTANCES,

AND IT REITERATED A STANDARD WHICH IT HAD PREVIOUSLY SET, WHICH SAYS THIS IS NOT TO SAY OF COURSE THAT THE SINGLE WARNING STANDARD POINT TO A SINGLE LEVEL OF SPECIFICITY SUFFICIENT IN EVERY INSTANCE. IN CERTAIN CIRCUMSTANCES AS WHEN AN EARLIER CASE EXPRESSLY LEAVES OPEN WHETHER A GENERAL RULE APPLIES TO A PARTICULAR TYPE OF CONDUCT AT ISSUE, A VERY HIGH DEGREE OF PRIOR FACTUAL PARTICULARITY MAY BE NECESSARY. BUT GENERAL STATEMENTS OF THE LAW ARE NOT INHERENTLY INCAPABLE OF GIVING FAIR AND CLEAR WARNING AND IN OTHER CIRCUMSTANCES A GENERAL CONSTITUTIONAL RULE ALREADY IDENTIFIED IN THE DECISIONAL LAW MAY APPLY WITHOUT OBVIOUS CLARITY TO THE SPECIFIC CONDUCT IN QUESTION,

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EVEN THOUGH THE VERY ACTION IN QUESTION HAS NOT BEEN PREVIOUSLY HELD TO BE UNLAWFUL.

I THINK A READING OF THE HOPE CASE TELLS ME THAT THERE – AND THE PRECEDENCE OF MY CIRCUIT TELL ME THAT CERTAINLY EXCESSIVE FORCE IN EFFECTING A SEIZURE OF A CITIZEN IS CLEARLY AND UNDOUBTEDLY AGAINST THE LAW. THE PELZER CASE I THINK ALLOWS THE ABSTRACT AND HYPOTHETICAL – REQUIRES THAT THE HYPOTHETICAL AND ABSTRACT REASONABLE OFFICER REASONED

ANALOGY FROM CASES WHICH INFORM OR MIGHT INFORM HIS JUDGMENT.

THE CASES THAT HAVE BEEN CITED TO ME GENERALLY NEATLY FILE – FALL INTO ONE OF TWO CATEGORIES. ONE CATEGORY IS WHERE THERE IS A WEAPON, BUT IT HAS BEEN PUT DOWN, AND THE PERSON IS COMPLIANT, OBVIOUSLY. IN THOSE CASES IT IS – IS HAS OFTEN BEEN HELD THAT THE USE OF DEEADLY FORCE IS NOT JUSTIFIED JUST BECAUSE OF THE WEAPON PRESENT IF IT IS APPARENT THAT THE PERSON IS COMPLYING AND THAT THE WEAPON HAS BEEN PUT DOWN.

THERE ARE AN EQUAL – I DON'T KNOW AN EQUAL NUMBER – BUT THERE ARE A NUMBER OF CASES THAT SAY THAT WHERE A PERSON BEIONG ARRESTED TAKES AN – MAKES AN AGGRESSIVE MOVE THE OFFICER IS JUSTIFIED IN USING DEADLY FORCE. THE BOX CUTTER CASE THAT I REFERRED TO – WHAT'S THE NAME OF IT?

MR. ROWLING: YOUR HONOR, THAT'S WOOD VERSUS CITY OF LAKELAND 203 F.3D 1288.

THE COURT: IS A GOOD EXAMPLE. OUT CAWSE IS A LITTLE DIFFERENT IN THAT PLAINTIFF – I MUST SAY JUST FOR THE SAKE OF THE

RECORD THAT THE PLAINTIFF HAS NO MEMORY OF WHAT HAPPENED WHEN HE WAS DOWN BECAUSE HE HAS TESTIFIED THAT HE WAS KNOCKED UNCONSCIOUS BY SOME BLOW OR BLOWS THAT OFFICER DAHLQUIST DELIVERED, AND SO THE PLAINIFF HAS PUT UP DAHLQUIST'S

TESTIMONY, AND THAT IS THE EVIDENCE THAT THE COURT HAS ON EXACTLY WHAT TRANSPIRED. AND I HAVE INTERPRETED THAT REALIZING THAT OFFICER DAHLQUIST HAS BEEN IMPEACHED BY A NUMBER OF DIFFERENT INCONSISTENT STATEMENT, I HAVE INTERPRETED THE EVIDENCE IN LIGHT MOST FAVORABLE TO THE PLAINTIFF, WHICH IS TO SAY, DAHLQUIST DIDN'T KNOW WHERE THE KNIFE WAS,. BUT HE COULDN'T SEE IT WHEN HE SHOT.

THE WILLINGHAM CASE THAT WAS CITED TO ME IS THE BEST BEACON I'VE GOT BECAUSE THERE THE PLAINTIFF HAD THROWN A KNIFE AT THE OFFICER, SHE WAS STANDING IN HER KITCHEN DOOR WHICH HAD BEEN THE SOURCE OF VARIOUS AND SUNDRY MISSILES WHICH SHE HAD HURLED AT THE OFFICER. THERE CLEARLY WAS PHYSICAL SEPARATION AND THE OFFICER SHOT HER, AND THE OFFICER WERE GIVEN QUALIFIED IMMUNITY BECAUSE THE COURT COULD FIND NOTHING THAT INFORMED THE OFFICER THAT UNDER THOSE CIRCUMSTANCES THE THREAT WAS SO ATTENUATED AS TO MAKE THE USE OF FORCE UNREASONABLE. THAT CASE HAS BEEN REVERSED AND REMANDED. I HAVE READ IT. IT DISCUSSES A NUMBER OF CASES. I DON'T FIND THAT IT HAS BEEN UNNECESSARILY NARROWED BECAUSE OF THE NARROWESS OF LASSITER. THAT COURT WAS UNABLE TO FIND ANYTHING THAT SAID THAT WHRE THERE HAD BEEN THE USE OF FORCE CAPABLE OF INFLICTING SERIOUS BODILY INJURY OR DEATH AND WHERE THERE WAS NOW

SEPARATION AND NO IMMEDIATELY APPARENT MEANS OF IMPOSING A – OR

INFLICTING DEATH OR SERIOUS BODILY INJURY, THAT NEVERTHELESS, BECAUSE THE OFFICER DIDN'T KNOW WHAT OPPORTUNITY SHE MIGHT HAVE TO DUCK BACK IN THE KITCHEN AND GET ANOTHER KNIFE OR OTHER WEAPON, THAT THE FACT – THAT THE DANGER WAS NOT SUFFICIENTLY ATTENTUATED.

SO I WILL GRANT YOUR MOTION TO DISMISS. I REALIZE THAT THIS IS AN UNSETTLED TIME, AND THAT THE DECISION MAY VERY WELL BE A CLOSE ONE, AND I WILL BE GLAD TO DO ANYTHING THAT I CAN DO TO FACILITATE AN INEXPENSIVE APPEAL, AND I WILL AWAIT YOUR TELLING ME WHATEVER THAT IS THAT I MIGHT DO. BUT IF YOUR CLIENT IS INDEED A PAUPER AND YOU SEEK TO PROCEED IN FORM OF PAUPERIS OR ANYTHING ELSE I CAN DO TO APPOINT YOU OR THAT SORT OF THING. I HAVE GOT TO DECIDE THAT CASE, I BELIEVE I HAVE DECIDED IT RIGHT, AND YET I REALIZED THAT THE ELEVENTH CIRCUIT MAY DO SOMETHING THAT NONE OF US CAN UNDERSTAND, SO I DON'T WANT TO MAKE IT HARD FOR YOU TO APPEAL THAT DECISION, DO YOU UNDERSTAND ME, MR. MILLAR?

MR. MILLAR: YES, SIR.